In The

Supreme Court of the United States

October Term

No. [illegible]

Allen V. Toussie, An Individual
Trading As, Allen V. Toussie Company,
Petitioner

vs.

Federal Trade Commission,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Wilson Brothers Printing Co. — RE. 7-2202 — Washington 1, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. .....

ALLEN V. TORNEK, An Individual
Trading As, ALLEN V. TORNEK COMPANY
Petitioner

-VS-

FEDERAL TRADE COMMISSION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. Paul Noble, Attorney for ALLEN V. TORNEK, prays that a writ of certiorari issue to review the judgment entered in the above case on the 23rd day of March 1960 by the United States Court of Appeals For The District Of Columbia Circuit, affirming an Order of the Federal Trade Commission.

OPINION BELOW

The Opinion of the Court Of Appeals (Appendix A, infra pp. 27-28 is reported at 276 F. 2d 513).

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra pp. 29-30) was entered on March 23rd, 1960. The

time for filing a petition for writ of certiorari was extended by order of Mr. Chief Justice Warren on June 21st, 1960 to July 15th, 1960 (Appendix C, infra p. 31). The time for filing was further extended by Mr. Justice Black, by order dated July 13th, 1960 until July 29th, 1960 (Appendix D, infra p. 32).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a grant of Patent by the United States Patent Office, for an advancement in the prior art of jeweled bearings in watches and like delicate instruments, can be made valueless by an Order of the Federal Trade Commission, which fails to recognize that the art can be or has been advanced?

2. Whether an administrative agency, such as the Federal Trade Commission, can set aside the Findings of Fact of one of its duly designated hearing examiners, who has heard all of the testimony and examined all of the exhibits after exhaustive hearings, without first finding that the examiner's findings were not based upon the weight of the evidence, or, is the setting aside of a hearing examiner's findings of fact arbitrary and capricious where the agency merely differs with his conclusions and does not first find that the examiner's findings were not supported by the weight of the evidence?

3. Whether competitor amici curiae can intervene in an administrative proceedings over the objection of the respondent, to file briefs on appeal to the agency which, in part, argue that the evidence should have been other than that heard by the hearing examiner at hearings in which the intervenors did not participate?

4. Whether a Court of Appeals, upon review of an Order of the Federal Trade Commission, can enter a

decree of enforcement, and, if so, whether such a decree, based upon an opinion of that Court which is in direct conflict, and inconsistent with the agency's findings upon which its Order was based, should be vacated for that reason.

STATUTES INVOLVED *

Section 5, The Federal Trade Commission Act: 38 Stat. 711, as amended; 52 Stat. 111, 66 Stat. 632; 15 U.S.C.A. 45: (a) (1), (6); (c); (d); (e); 49.

Pertinent Sections of the Administrative Procedure Act; 60 Stat. 237; 5 U.S.C.A. 1004 (b), 1005 (a), 1006 (c), (d); 1007 (a), 1009 (a), (e).

Pertinent provisions of the Patent Laws, "Patentability of Inventions" is: 35 U.S.C.A. 101, 103.

RULE

Rules of Practice, Procedure and Organization of the Federal Trade Commission, May 1957, 22 Fed. Register 2077, Section 3.11 (a) "Voluntary Intervention" reads as follows:

> Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor . . . (b) The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise shall be deemed proper. (as amended, effective April 13, 1957).

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* The text of the several provisions of the various statutes involved are lengthy, and pursuant to the provisions of Rule 23, 1 (c) are set forth in the appendix to this petition, infra. Appendix F, G, H, pp. 41-46)

STATEMENT OF THE CASE

Federal jurisdiction in the Court below was based upon the Federal Trade Commission Act; 15 U.S.C.A. 45 (c), (d) and (e).

The Federal Trade Commission in its complaint (J.A. 1-6) charged the respondent, Allen V. Tornek, trading as Tornay Watch Company, who will hereinafter be referred to as respondent, with using unfair methods of competition and unfair and deceptive acts and practices in commerce, all in violation of Section 5 of the Federal Trade Commission Act, alleging that he made certain representations concerning his Tornay watches which were false misleading and deceptive.

Among such representations were statements that certain of his watches, containing a patented device (J.A. 1061-1064; 1109-1110) are 21 jewel watches, which the Commission alleges, is untrue, because a 21 jewel watch must contain 21 jewels "each of which serves a mechanical purpose as a frictional bearing, that is, each jewel provides a mechanical contact at a point of wear", and the four jewels contained in the Resevoil[2] device do not serve that purpose and do not perform that function. (J.A. 3, "Paragraph Six" and "Paragraph Seven").

Another alleged false representation was that respondent's watches "provide twice as much oil to the vital parts of the watch". (J.A. 2, "Paragraph Five")

Another was that before shipping his watches to purchasers, respondent affixed price tags to his watches, by means of which he placed into their hands "a means and instrumentality by and through which they may represent

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[1] J.A. refers to the Joint Appendix in the Court of Appeals.

[2] "Resevoil" is the trade name given the invention. It contains four jewels, secured into a plate or bridge, which is affixed to a basic 17 jewel movement. (J.A. 1, "Paragraph Two")

such amounts as the usual and regular retail prices", which the Commission alleged, is not true. (J.A. 3, "Paragraph Eight")

The Complaint also alleged other specific misrepresentations such as, "the (Reservoil) device provides a significant amount of oil to the vital parts of the watch and assures longer life expectancy", but these are not subject of this appeal since the Commission adopted the hearing examiner's findings and conclusions with respect to such representations. (J.A. 135-137, 222)

Respondent Tornek, in his answer, denied each and every material allegation of the complaint. (J.A. 6-7)

Administrative hearings were held before the duly designated hearing examiner of the Commission, at various times and places from January 4th, 1956 to April 15th, 1958. Much technical or expert testimony was adduced by both parties and many technical exhibits were introduced into evidence.[3]

On September 23rd, 1958, the hearing examiner entered his "Initial Decision", with comprehensive Findings of Fact; Conclusions and an Order. (J.A. 123-139)

His findings and conclusions were of tremendous industrial significance, for, on cross appeals to the Commission, competitors moved to intervene and file briefs as amici curiae on appeal. Each such motion was opposed by respondent, granted sans hearings by the Commission—appealed by respondent and appeals denied,[4] again without hearing.

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[3] Transcript of proceedings, (J.A. 243-1059) 35 Exhibits were designated for printing in the Joint Appendix, others are included in the original record transferred to this Court.

[4] *The Hamilton Watch Co. & The Elgin National Watch Co.*, (J.A. 139-141, 144, 146, 147, 151); *The American Watch Association*, (J.A. 141-143, 145, 146, 151, 152, 157); *Bulova Watch Co., Inc.*, (J.A. 156, 158, 159, 160)

After hearing and oral argument on cross appeals (J.A. 161-2[illegible]) the Commission entered its "Findings As To The Facts", "Conclusions", and "Order", (J.A. 213-222) with its "Opinion". (J.A. 222 A)

The Commission entered its own "Findings of Fact" on the 21 jewel question, (J.A. 214-221) and disregarded those previously entered by the hearing examiner, who had heard and weighed all of the evidence, on this same question. (J.A. 126-137)

However, the Commission adopted the findings of the hearing examiner on the two issues created by the pleadings, that he had found against respondent.[5] (J.A. 220-222)

Facts Not In Dispute

The Resevoil device is patented. It contains four (4) jewels. These jewels are of essentially the same shape and size as any of the cap jewels traditionally found in 17 and 21 jewel watches; they are friction fit into precision engineered plates or bridges and are manufactured from the same synthetic materials from which all other watch jewels are manufactured by the largest jewel bearing manufacturer in the Country.

Without disturbing the timekeeping qualities of the watch movements, the Resevoil plates, after adding oil to the bottom of each of the four jewels, are adjusted, by competent watchmakers, to the train bridge of basic (and conventional) 17 jewel movements by merely removing two screws fastening the train bridge to the movement, and inserting two, longer, precisely tooled screws which adjust and fasten the Resevoil plate and each of

[5] Fictitious Pricing and with respect to the representation that the Resevoil device adds twice as much oil to the vital parts of the watch, both questions being found against respondent by the examiner primarily because of "stipulation" of counsel made to save time during the course of the hearings. (J.A. 125, 135)

the four jewels therein directly over the four exposed hole jewels, always found in 17 jewel watch movements.

The four Reservoil jewels, thus oiled and adjusted, do not touch any moving part of the movement. The moving parts, to which they are adjusted to "capillary closeness" but do not touch are the protruding pivots of the four wheels in the train of the watch, which extend through and rotate in four hole jewels which constitute journal bearings. (J.A. Exhibits 7, 23, 24, 25, 26, 27, 34, 35, pp. 1071, 1085, 1086, 1087, 1088, 1089, 1097, 1098).

All jeweled watches contain hole jewels, cap jewels, two pallet stones (included in the conventional jewel count) and a roller (also included in the conventional jewel count). (J.A., Exhibit 43, page 1106)

The hole jewels perform a journal function, and because pivots used in a simple hole jewel construction (hole jewel without a superimposed cap jewel) are square shouldered just above the lateral point at which they enter the hole of the jewel so that the shoulders can rest on the jewel surface and prevent the pivot from sliding through, such jewels perform the function of retaining the lateral motion of the wheel or side shake, and of containing the vertical movement, or end thrust. In addition such hole jewels perform the vital lubrication function of a bearing since a minute droplet of oil is added at the hole of each such jewel when it is adjusted over the train wheel for which it was designed. (J.A. Exhibit No. 5, page 1069)

Generally speaking, the simple or single hole jewel construction (Exhibit 7, J.A. 1069) is found only in 17 jewel constructions and, in such, is commonly found at the end of each of the four train wheels on the "back" side of the watch, as opposed to the "dial" side. Hence the pivots of those four wheels are exposed, protruding through the hole and covered only by the back of the watch case. (Exhibit 43, J.A. 1106)

However, cap jewels, adjusted over and in combination with hole jewels and utilizing a conical rather than a square shoulder pivot construction (Exhibit 6, J.A. 1070) are found at these same four (train wheels) points in conventional 21 jewel watches. They are adjusted over the hole jewels at those points in much the same manner that the Resevoil jewels in the respondent's construction are adjusted over those same wheel pivots. However, the train wheels' pivots will, at times, touch the cap jewels in the conventional 21 jewel construction because, the square shoulder pivot being absent, the conical pivots will be retained by the cap jewels when the watch is in such a position as to thrust the wheels to those jewels. They will not, on the other hand, touch the four Resevoil jewels in respondent's construction, because their square shoulder pivots are retained by the hole jewels and their thrust to the Resevoil (cap) jewels is prevented. (Exhibit 7, J.A. 1071)

The conventional cap jewel construction is found in both 17 and 21 jewel watch movements. It will always be found at both ends of the balance wheel in both 17 and 21 jewel watches. Its use will vary somewhat at other pivot points depending upon the watch designer or manufacturer. However, it is usually not used on the back or train side of 17 jewel watches but these same wheel pivots are covered by cap jewels in both conventional and Resevoil type 21 jewel watches—the difference being that the pivots can touch the former but cannot touch the latter.

In conventional cap jewel systems the wheel pivot is retained laterally by the hole jewel just as in the simple hole jewel system. The end thrust or vertical movement, however, is contained by the cap stone instead of the inside of the hole jewel.

At time of assembly or adjustment, the watchmaker will add one droplet of oil to the hole jewel. (No oil is

usually placed in the hole of the hole jewel) and hence, the cap jewel serves the lubricating function in the conventional cap jewel construction and such systems contain the same amount of oil as do the simple hole jewel systems, but they retain it longer.

Thus, both conventional or historic bearing constructions in watches perform the same three mechanical functions, but in different ways.

The Resevoil type system, however, also performs those same three mechanical functions, but the four Resevoil cap jewels will never touch the pivots over which they are adjusted.

But, substantially more oil is placed into the Resevoil system than in either the simple hole jewel or the conventional cap jewel bearing system. At time of assembly or adjustment one droplet of oil is placed in the hole of each of the four exposed hole jewels in the train, and, in addition, one drop of oil is placed on the bottom of each of the four Resevoil cap jewels. Thus, each of the four Resevoil jewel bearing systems created by the adjustment of the Resevoil plate to the 17 jewel movement will contain substantially more oil than any of the conventional systems found in the same movement. (J.A. 135-137, 220)

It is not disputed that respondent never affixed price tags to his watches, but rather, mailed, in bulk, a number of price tags, including various denominations, to his customers when shipping their orders. The denomination to be affixed to a given watch was determined by the customer without consulting respondent—the tags were then affixed to the watches by the customer.

Facts In Dispute

Having heard the technical expert testimony and examined the physical exhibits the hearing examiner found that the Commission had not sustained its burden of prov-

ing the premise upon which the Complaint based its allegations of misrepresentation insofar as 21 jewels was concerned, i.e., it did not establish that a jewel to be represented as such must serve a mechanical purpose as a frictional bearing, that is, provide a mechanical contact at a point of wear.[6]

None of the government witnesses testified that a watch jewel must serve a mechanical purpose as a frictional bearing in order to be classified as a jewel. On the other hand, many of them testified that several of the jewels in traditional (conventional) 17 and 21 jewel watches are not bearings.[7] (J.A. 126, 127)

The basic divergence between the experts called by the government and the respondent was whether or not the cap jewels in the respondent's device serve any useful purpose.[8] (J.A. 130)

Some of the watch repairmen called by the government testified that the purpose of the conventional cap jewel construction is to reduce friction, the respondent's ex-

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[6] Mr. Piper, the hearing examiner, stated: "The complaint alleged that a jewel must serve a mechanical purpose as a frictional bearing and that because the four jewels contained in the Resevoil device do not . . . respondent's watches are not 21 jewel watches." "While this definition of a jewel was assumed in the complaint, the record does not substantiate it." (J.A. 126)

[7] The two pallet stones and roller are found in all jeweled watches. Though composed of the same material as the jewels in a watch, many of the government's witnesses and most of respondent's experts testified that they are not bearings though they are included as three of the jewels in every 17 and 21 jewel count.

[8] "The record establishes beyond dispute that one of the most essential features in the proper functioning of a watch is the maintenance of lubrication at the bearing points, i.e., where the pivot points turn in the hole jewels." (J.A. 130)

perts disagreed and the examiner found them overwhelming convincing.[9]

On the evidence, the hearing examiner found that "a regular cap jewel (found in traditional 21, non Resevoil jewel watches) does not serve a useful mechanical purpose as a frictional bearing but indeed, increases friction, and its purpose is to maintain the lubrication longer." "*It follows therefore that the cap jewels in a regular (non Reservoil) 21 jewel watch, as well as the two or three in a regular 17 jewel watch are not frictional bearings and a watch jewel does not have to be such to be classified as a jewel in the trade.*" (J.A. 132)

Then, *finding that the two pallet stones and the roller, (found in all jeweled watches) do not serve the function of a bearing* (J.A. 133) *the examiner held, on the evidence, that a watch jewel does not have to serve as a frictional bearing in order to be classified as a jewel in the industry.* (J.A. 133)

Differing with government witnesses, respondent's experts established, and the examiner found that the Resevoil device is a great improvement in the traditional art, and serves a highly useful purpose by "increasing the reservoir of oil and reducing evaporation and oxidation of the lubricant, thereby insuring longer life of the watch and less frequent cleaning."[10]

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[9] ". . . but a preponderance of the reliable and substantial evidence in the entire record establishes that there is no substantial difference in the friction caused by end thrust in the two different types of construction, the square shouldered and the conical shaped pivots." (J.A. 130) See also exhibit 35, 36, A, B, C, D; 37A, B (J.A. 1098-1104)

[10] "By capping the hole jewels with the Resevoil device, the same prevention of evaporation and oxidation is accomplished (as by the cap jewel in the conventional system), as well as the addition of a reservoir of oil two or three times as great as that in the regular type 21 jewel construction." "Since the regular hole jewel with square shoulder pivots starts out with greater accuracy

The Commission, on appeal, entered no specific finding which set aside those of the hearing examiner as being contrary to or against the weight of the evidence. (J.A. 214-221)

Finding as was conceded, that all jewels including the two pallet and roller in conventional 17 and 21 jewel watches can or do come in contact with a moving part at a point of wear, the Commission concluded that they were frictional bearings, without disposing of the examiner's findings above summarized. (J.A. 218)

The Commission found "some" evidence, (J.A. 218, 219), but ignored the weight of evidence which the examiner found to refute that same testimony.[11] (J.A. 220)

Judicial Review

On Petition To Review (J.A. 223-232) respondent appealed to the Court of Appeals for the District of Columbia Circuit.

That Court, on February 25th, 1960 entered a per curiam opinion: (Appendix A, infra pp. 27-28)

> PER CURIAM: This is a petition to review an order of the Federal Trade Commission holding, *inter alia*, that petitioner made unfair and deceptive representations to the effect that a watch he was marketing was a 21-jewel watch. The Practices were found prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45 (1958).

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[10] (Continued):
than that in a 21 jewel watch, a device which would enhance its lubricating feature as much as or greater than the usual 21 jewel construction, actually would result in a better construction than that found in the standard 21 jewel watch." (J.A. 134)

[11] Nowhere in its Findings of Fact does the Commission mention or refer to the "weight" or "preponderance" of evidence. It would appear that it found "some" evidence enough without consideration of the time and ability of the examiner to weigh and evaluate the testimony of the witnesses he heard.

> Examination of the testimony before the Federal Trade Commission shows clearly that in the 21-jewel watch commonly sold by others in the trade there are no jewels that do not have either a function of bearing or a function of protection against wear from friction, and that it is only stones that perform these functions that are properly called "jewels" in the watch industry. Cf. Tariff Act of 1930, 46 Stat. 621-622, 19 U.S.C., Section 1001; Par. 367 (b) (1958).
>
> As to the Resevoil device in question, convincing evidence indicated that the four stones of the Resevoil did not serve a mechanical function of bearing or of protection against frictional wear.
>
> Petitioner's statement that the Resevoil watches were 21-jewel watches is therefore misleading. We have examined the petitioner's other objections but find no error.
>
> The order of the Federal Trade Commission is affirmed and enforcement is granted.

Petition for Re-Hearing was filed before entry of the Court's final decree, pointing out the inconsistency of the Opinion with the Order of the Commission.[12] (Appendix E, infra pp. 33 to 40)

The Court of Appeals denied the Petition and entered its Final Decree Enforcing Order To Cease And Desist on March 23rd, 1960. (Appendix B, infra, pp. 29-30)

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[12] The Order, based upon Findings of Fact and Conclusions of Law of the Commission would require respondent to cease and desist from "Representing directly or by implication, that his watches . . . contain a designated number of jewels such as "21 jewels" unless said watches actually contain the stated number of *jewels, each and every one of which serves a mechanical purpose as a frictional bearing.*" On the other hand, the Opinion of the Court, which will be the guide for the industry on this point, upon "examination of the testimony" held: "that there are no jewels that do not have either a function of bearing or a function of protecting against wear from friction." (supra.)

REASONS FOR GRANTING THE WRIT

The following are the special, important reasons why this writ should be granted:

1. The Court of Appeals has decided several important questions of federal law in a way which has not been, but should be, settled by this Court.*

Conflict Of Administrative Determinations

It is not disputed, in fact the complaint alleges, that the Resevoil device is protected by the grant of a United States Patent (supra.).

The device is conceded, even by the Commission (J.A. 215-216) to consist of a tiny metal plate, into which four jewels, similar in size, shape and substance to any other cap jewels in a watch, are friction fit. The plate and, indeed the jewels themselves are precision engineered by Rene Marie Fiechter, inventor, watch engineer and physicist. (J.A. 130-132) Exhibits: 23 B, C, D, E, 13, 14, 15, 16 (J.A. 1061-1064, 1074-1084)

But the patent was not granted on the plate with the four jewels, but upon the claimed advancement in the prior art created by the assembly of the four jewels in the plate over the exposed hole jewels in the train, thus constituting novel and inventive, improved new jewel bearing systems at each of those four points in the watch. (J.A. 1061)

Obviously, the four jewels thus adjusted, become parts of four new watch jewel bearing systems, invented by Mr. Fiechter and protected by his patent. The jeweled plate

* References to the original record or to the Joint Appendix filed in the Court of Appeals will not be repeated under "Reasons, etc." if such reference has already been made under "Statement, etc.". However, if a reference is made to the record for the first time, the Joint Appendix and Exhibit numbers will be cited.

itself, unassembled, having no utility, could not have been patented.

The Court will take official notice of the provisions of the patent laws which give rise to a presumption of validity of a patent in favor of the patentee.[13]

Only one who invents a new and useful thing, or a new and useful improvement thereof may obtain a patent therefor.[14]

"A patent may not be obtained if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."[15]

The Court of Appeals, in reviewing the record of hearings below may well have overlooked the facts here set forth, since counsel did not have sufficient time during oral argument to develop them for inquiry by the Court in the manner here outlined.

Hence, in reaching its decision, that Court may have been unaware of the conflict of its opinion and final decree entered thereon with the findings of the United States Patent Office.

By so doing, the Court reduced to the mere sham of a paper grant, the commercial value of the inventor's acknowledged monopoly.

Whether the Federal Trade Commission can, through exercise of its powers under Section 5 of its organic Act, diminish or nullify the acts of the United States Patent Office in granting patents for improvements in

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[13] 35 U.S.C.A. 237

[14] 35 U.S.C.A. 101 (Appendix H, infra pp. 46)

[15] 35 U.S.C.A. 103 (Appendix H, infra pp. 46)

prior arts, which create concepts which, when used in advertising, differ historically from the trade or industry acceptance of the art improved upon, is a question of grave national significance that has never been considered by this Court.

As this case is now postured by the Commission Order, the Court's Opinion and Final Decree of Enforcement, respondent can use his patented Resevoil device in his watches; but he cannot call them what they are—jewels constituting parts of newly constituted bearing systems in watch movements and admittedly different from established industrial concepts of watch bearings, for if they were not, the patent would not have been granted.

In a case[16] decided in the District of Columbia Circuit in 1959, the jurisdiction of the Commission was attacked upon the broad grounds that the proceedings before the Commission were an attack upon the patent itself, only tenable in an appropriate proceedings before a federal district Court.

That Court held that the scope of a patent is limited to the scope of the claims described in the claims of the patent, read in the light of the specifications.[17]

A claim in patent law has a mechanical meaning.[18] And the Court in the Decker case concluded from this statutory fact that the patent "covers the device alone." "It cannot be understood to embrace the methods employed in advertising or selling the patented product."

It is pointed out however, that in the Decker case the representations made referred to the functioning of the

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[16] *Decker, et al.* v. *Federal Trade Commission*, 176 F. 2d 461.

[17] *Motion Picture Patents Company* v. *Universal Film Manufacturing Company*; 243 U.S. 502; 37 S. Ct. 416; 61 L. Ed. 871. and other cases cited in the Decker case (ibid.)

[18] 35 U.S.C.A. 33, *Decker* v. *F.T.C.*, (ibid.)

patented device; but in the instant case the representations made are generic in nature insofar as they hold forth respondent's watches as 21 jewel. The invention here is an improvement of the watch jewel bearing, generically the same as any other jewel in a watch and only represented to be what it is.

The case at bar is further distinguishable from the Decker case in that the evidence supported, and the examiner who heard it found the utility of the improvement in the prior art of watch jewel bearings claimed in the patent.

It should also be noted that the learned, deceased Chief Judge Stephens entered a vigorous dissent in the Decker case.

> If the utility of the invention, as portrayed in the specification which is made a part of the Letters Patent cannot be advertised, then the invention, as a practical matter, cannot be sold.
>
> In effect, therefore, the Trade Commission, in entering its cease and desist order, is asserting power to review, and render in part nugatory the action of the Commissioner of Patents in granting the patent to the device in question . . . I think the Trade Commission has no such power.*

Nor was the question here presented raised or decided in *United States* v. *Masonite Corp.*; 316 U.S. 265; 62 S.Ct. 1070; 86 L.Ed. 1461, or in *Standard Sanitary Mfg. Company* v. *United States*; 226, U.S. 20; 33 S.Ct. 9; 57 L.Ed. 107.

Apart from the above consideration of related but not controlling questions, the question here raised has not been decided by this Court and should be in the public interest.

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* *Decker* v. *F.T.C.*; supra. pp. 465-468

Can The Commission Set Aside A Hearing Examiner's Findings, Based Upon The "Weight Of the Evidence", Which He Has Heard, And Enter Its Own Findings Based Upon "Some" Evidence?

The "Statement", above clearly points up an instance of Agency disregard for findings of fact made, after hearings by the examiner it designated to receive and weigh that evidence.

In his initial decision, the hearing examiner detailed and explained the evidence and, in every instance, explained why the weight balanced the scale in the direction found. Ignoring this and sans reference to his findings in its own "Findings as to the Facts", the Commission, finding "some" evidence, to which the examiner alluded in his determination of the weight, sufficient to support conclusions differing from his, did so.

Neither the Commission, nor the reviewing Court found that the public had been deceived by respondent's representations that his watches were 21 jewel watches. The Commission itself has held that such a finding, based upon the evidence, must be made.[19]

The burden of proving the allegations of the complaint was, of course, upon the Commission.[20]

Unlike the examiner, the Commission did not weigh the evidence or find that the government had sustained its burden of proof. Without reference to these evidentiary elements and, sans disposing of the examiner's references to them, the Commission entered Conclusions reversing his, on Findings which recited some of the evidence of some of the witnesses whose testimony the examiner had

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[19] *In The Matter Of Samuel A. Mannis;* docket no. 7062, Opinion dated February 9th, 1960.

[20] 15 U.S.C.A. 45 (c) Appendix F, infra pp. 41-42
5 U.S.C.A. 1006 (c), Appendix G, infra pp. 43-45

discussed in arriving at his determinations of the weight to be given all of the testimony. (J.A. 130-134, 218-220)

Sections 1007 (a), (b) of the Administrative Procedure Act * deal with the conclusiveness, finality and nature of Initial Decisions. However, these sections have never been construed by this Court and should be, they being of grave moment in the epoch of quasi-judicial adjudication of private rights.

To some extent the function of a hearing examiner under the Administrative Procedure Act has been the subject of judicial inquiry.

Hence, an examiner's findings should not be overlooked without very substantial preponderance in testimony as recorded.[21]

And, the Federal Trade Commission must prove its charges by competent, material and substantial evidence.[22]

It has been held that the findings and conclusions of administrative agencies must be supported by such "substantial" evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained.[23]

Sections 1006 (c) (d) and 1007 (a) and (b) of the Administrative Procedure Act, should be construed by this Court and a rule established defining the scope and limitations of agency review of its examiner's findings, the weight to be given his findings by the agency on appeal, as well as the limitations upon the agency's power

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* 5 U.S.C.A. 1007 (a) (b)

[21] *Allentown Broadcasting Corp.* v. *F.C.C.*; 222 F. 2d 781

[22] *Concrete Materials Corp.* v. *F.T.C.*; 189 F. 2d 359

[23] *U.S. ex rel Lindenau* v. *Watkins*; 73 F. Supp. 216, (reversed on other grounds; 164 F.2d 458) *Edelman & Co.* v. *F.T.C.*; 239 F.2d 152. *Gelb* v. *F.T.C.*, 144 F.2d 580.

to set aside its examiner's findings with respect to burden of proof and weight to be given the evidence.

The Intervention Of Competitor Amici Curiae

Another federal question, never decided by this Court but also of great economic significance, is raised by the permitted intervention of competitors, asserting private rights, at the appeals stage of the Commission proceedings—by statute limited and conducted in the public interest.

The respondent argued in the reviewing Court that the intervention of Bulova, Elgin and Hamilton, and the American Watch Association, over objection and without hearings on the various motions to intervene filed by them, is a denial of due process of law.

Respondent concedes that a rule of the Commission permits intervention in the sound exercise of the discretion of the examiner or the Commission.[24]

But respondent contends that the permitted intervention in this case was an abuse of discretion, and, a fortiorari, that the Rule itself is an unlawful exercise of delegated power and a denial of due process of law.

Respondent suggests that the surreptitious reversal of the examiner's findings may have been due to an unconscious effort on the part of the Commission to meet the challenge of an industry suddenly at war with a small competitor, possessed of a patented means of invading their prerogatives unless their briefs, replete with argument that the evidence should have been other than it was, would serve to snatch the slingshot from the hands of David.

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[24] Rules Of Practice, Procedure & Organization Of The Federal Trade Commission; promulgated May 1957, Sec. 3.11 (a) "Voluntary Intervention". 22 Federal Reg. 2077 (quoted supra under heading "Rule" in this Petition.)

Surely, a review of the record, reveals that the only substantial evidence supporting the findings and conclusions of the Commission, appears in the arguments in the several briefs filed by the amici curiae, were not in attendance at the hearings and never subjected to cross examination.

Involved are several sections of the Administrative Procedure Act,[25] but these sections, again have not been construed by this Court and no Court has yet decided the specific questions here raised, although there are recorded cases concerned with intervention generally.[26]

But the federal question involved in the interference with rights in private property without due process by an agency's permitted intervention of private, competitor, interests in a public proceeding in which their only interest is their pocketbooks, should be resolved by this Court.

Inconsistency Of Opinion & Final Decree Of The Court Of Appeals, With Order Of The Commission Based Upon Findings In Conflict With Those Set Forth In The Court's Opinion

The Complaint issued by the agency alleged: (J.A. 2. "Paragraph Six")

> . . . respondent represents and has represented directly or by implication that said Tornay watches contain 21 jewels each of which *serves a mechanical purpose as a frictional bearing, that is each jewel provides a mechanical contact at a point of wear* . . . (emphasis supplied)

It is clear that the alleged misrepresentation was that respondent's 21 jewel watches, when they contain the four

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[25] Sections 1104 (b), 1005 (a), 1006 (c) Appendix G, infra pp. 43-45.

[26] *Horsey Cancer Clinic* v. *Folsom;* 155 F. Supp. 376. *U. S.* v. *Smith;* 87 F. Supp. 293. *U. S.* v. *Radio Corp. of America;* 3 F. Supp. 23. *Northern Securities Co.* v. *U. S.;* 24 S. Ct. 119; 191 U. S. 555; 48 L.Ed. 299.

Resevoil jewels, are not 21 jewel watches because those four do not serve a mechanical purpose as frictional bearings.

The issue before the Agency, simply stated, was whether watch jewels must serve a mechanical purpose as frictional bearings and, if so, whether the four Resevoil jewels served such purpose.

The examiner, in his initial decision, (J.A. 123-138) found that the Resevoil device "*significantly increases the amount of oil to vital parts of the watch and assures longer life expectancy thereof*". (J.A. 135-136)

Pragmatic evidence supported this finding, (J.A. 1107-1108).

Accordingly, the examiner entered the following order with reference to the 21 jewel question. (J.A. 138)

> IT IS FURTHER ORDERED that the allegations of the Complaint that respondent falsely represented his watches to contain 21 jewels, and that his device significantly increased the amount of oil to vital parts of the watch and assured longer life expectancy thereof, be and hereby are dismissed.

The Commission affirmed the examiner's finding that the Resevoil jewels significantly increase the amount of oil to the vital parts of the watch and assure longer life expectancy thereof: (J.A. 222 H) "It is Ordered that the Complaint be dismissed insofar as those representations are involved". (J.A. 222)

The Commission had concluded in its Opinion (J.A. 222 G) that "As used in the watch industry and trade, *a jewel must serve a mechanical function as a frictional bearing before it is entitled to be represented as a 'Jewel'*".

Among other findings, the Commission found: (J.A. 216)

> . . . it is essential that the hole jewel be lubricated with oil . . . In the traditional 17 jewel watch, the four (train bridge) hole jewels are, in effect, open at the point where the pivot comes through . . .
> . . .
>
> and (J.A. 217):
>
> . . . Respondent's device, which has been patented by the Patent Office, consists of a small metal plate containing four stones of identical construction and material as the cap jewels found in regular 17 jewel and 21 jewel watches . . .
>
> . . . it fits exactly over the train bridge of the 17 jewel watch, (over the exposed or open hole jewels) . . .
>
> . . . in the same manner as the cap jewels in a regular 21 jewel watch . . .

Thus, the essence of the Commission Order and the findings and Opinion entered is that a *jewel must serve a mechanical purpose as a frictional bearing by providing a mechanical contact at a point of wear.*

The Court, however, upon reviewing the record, found that in 21 jewel watches sold by others in the trade "*there are no jewels that do not have either a function of bearing, or a function of protection against wear from friction.*" (Appendix A, infra pp. 27-28)

This definition is inconsistent with the Order and Findings of the Commission from which review was sought, and in fact, supports the respondent's view of the evidence set forth in his Petition To Review—for in fact, the evidence holds and the *Commission found as did the hearing examiner initially, that the four Reservoil jewels do perform the function of "protection against wear from friction".**

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* Since the device significantly enhances the lubrication of the bearings (vital parts) and such function is that of the lubricant in bearings.

This function is performed by significantly increasing the amount of oil at the vital parts of the watch and the Commission found respondent's device does.

This Court has held that a rehearing will not be granted because of an inadvertent expression in the opinion, which could have no possible influence on the reason stated which rendered it necessary to affirm the judgment. *Bradford* v. *U. S.*, 33 S. Ct., 1028, 57 L. Ed. 1630. But, from the reasoning of this Court in affirming the denial of petition for rehearing in that case, it appears logical that a rehearing should be granted where the expression in the opinion of the Court appears on its face inconsistent with the reasons given for affirming the decision being reviewed.

The fourth paragraph of Section 49 of the Federal Trade Commission Act * gives jurisdiction to the district courts of the United States upon request of the Attorney General or the Commission or of the Commission, to effect compliance with any Order of the Commission made in pursuance of that Act.

Section 5 (c) of the same Act ** vests jurisdiction in the Courts of Appeal and power to make and enter a decree *(1) affirming, (2) modifying or, (3) setting aside the order of* the Commission.

And, Section 5 (d) of the Act *** reiterates the power of the Courts of Appeals to affirm, set aside, modify an Order of the Commission, but vests the additional power to enforce.

Thus, there appears to be an inconsistency in the legislation between Sections 5 (d) and 9 on the one hand, and 5 (c) on the other, since either a Court of Appeal has

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* 15 U.S.C.A. 49 (Appendix F, infra. p. 42)

** 15 U.S.C.A. 45 (c) (Appendix F, infra. p. 41)

*** 15 U.S.C.A. 45 (d) (Appendix F, infra. p. 42)

the power to affirm, modify or set aside as granted the sections 5 (c) and 9, with jurisdiction in the district courts to enforce; or it has all four of the powers, as vested by section 5 (d) in derogation of the other two sections.

If the *Courts of Appeals have power to enforce*, then the Final Decree here entered was entered pursuant to law, but, on the other hand, if jurisdiction *to enforce rests in the district courts*, then that Order is contrary to law and should be set aside by this Court.

At all events the serious federal questions arising from the conflict of statutory provisions has not been, but should be decided by this Court.

CONCLUSION

The decision below presents questions of grave importance in the administration of Section 5 of the Federal Trade Commission Act and, the economic impact of that decision being indicated by industrial intervention when the examiner found for respondent below, this petition for a writ of certiorari should be granted.

Respectfully submitted,

B. PAUL NOBLE
Attorney For Petitioner
2140 P Street, N.W.
Washington 7, D. C.
DUpont 7-3292

Of Counsel:
NOBLE & MOYLE
Washington, D. C.

CERTIFICATE OF SERVICE

Certified that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI was mailed this ..... day of July 1960, postage prepaid to Frederick H. Mayer, Esq., Federal Trade Commission, Washington, D. C., Alan B. Hobbes, Esq., Federal Trade Commission, Washington, D. C., Office of the Solicitor General, Justice Department, Washington, D. C.

B. PAUL NOBLE
Attorney For Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15273

ALLEN V. TORNEK, an individual, trading as ALLEN V. TORNEK COMPANY, PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT.

On Petition to Review an Order of the Federal Trade Commission.

Decided February 25, 1960

Mr. B. Paul Noble for petitioner.

Mr. Frederick H. Majer, Attorney, Federal Trade Commission, with whom *Mr. Alan B. Hobbes*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before Mr. Justice REED, retired,* and EDGERTON and FAHY, Circuit Judges.

PER CURIAM: This is a petition to review an order of the Federal Trade Commission holding, *inter alia*, that petitioner made unfair and deceptive representations to the effect that a watch he was marketing was a 21-jewel watch. The practices were found prohibited by § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1958).

Examination of the testimony before the Federal Trade Commission shows clearly that in the 21-jewel watch com-

* Sitting by designation pursuant to the provisions of Sec. 294(a), Title 28, U. S. Code.

monly sold by others in the trade there are no jewels that do not have either a function of bearing or a function of protection against wear from friction, and that it is only stones that perform these functions that are properly called "jewels" in the watch industry. Cf. Tariff Act of 1930, 46 Stat. 621-622, 19 U.S.C. § 1001, Par. 367 (b) (1958).

As to the Resevoil device in question, convincing evidence indicated that the four stones of the Resevoil did not serve a mechanical function of bearing or of protection against frictional wear. Petitioner's statement that the Resevoil watches were 21-jewel watches is therefore misleading.

We have examined the petitioner's other objections but find no error.

The order of the Federal Trade Commission is affirmed and enforcement is granted.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,273

ALLEN V. TORNEK, an individual trading as ALLEN V. TORNEK COMPANY, PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Before Mr. Justice REED, sitting by designation, and EDGERTON and FAHY, Circuit Judges.

FINAL DECREE ENFORCING ORDER TO CEASE AND DESIST

Petitioner herein having filed in this Court on July 24, 1959, a petition to review and set aside an order to cease and desist issued against him on May 13, 1959, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Allen V. Tornek, an individual, trading as ALLEN V. TORNEK COMPANY, Docket No. 6344;" and a copy of said petition having been served upon respondent and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on February 4, 1960, and this Court having thereafter fully considered the cause and having rendered its decision on February 25, 1960, affirming said order:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by this Court that the aforesaid petition to review be, and it is hereby, denied, that the order of the Federal Trade Commission, as heretofore affirmed, be,

and it is hereby, enforced, and that petitioner be, and he is hereby ordered to obey and comply with the terms of the order of the Commission; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that petitioner shall, within ninety days after entry of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which he has complied with the order of the Commission.

Without prejudice to the right of the United States, as provided in the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, heretofore affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

.....

.....

.....

United States Circuit Judges.

Entered: March 23, 1960

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1959

ALLEN V. TORNEK, an individual trading as,
ALLEN V. TORNEK COMPANY, PETITIONER,

v.

FEDERAL TRADE COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 15th, 1960.

(S) EARL WARREN
Chief Justice of the United States.

Dated this 21st day of June, 1960.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

ALLEN V. TORNER, ETC., PETITIONER,

v.

FEDERAL TRADE COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including July 29th, 1960.

(S) HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of July, 1960.

APPENDIX E

PETITION FOR RE-HEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,273

ALLEN V. TORNEK, an Individual, Trading as ALLEN V. TORNEK COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

B. PAUL NOBLE
2140 P Street, N.W.,
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Attorney for Petitioner

Of Counsel:

NOBLE & MOYLE
2140 P Street, N.W.
Washington 7, D.C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,273

ALLEN V. TORNEK, an Individual, Trading as ALLEN V. TORNEK COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR RE-HEARING

Comes now the petitioner herein and by and through his attorney, B. Paul Noble, most respectfully petitions the Court to Re-hear the Petition To Review and Set Aside Order of the Federal Trade Commission, denied, Per Curiam, by this Court's Decision dated February 25th, 1960 and entered on the 26th day of February 1960.

As reasons therefore, petitioner submits the following:

In its opinion dated February 25th, 1960, the Court, per curiam, stated:

> Examination of the testimony before the Federal Trade Commission shows clearly that in the 21 jewel watch commonly sold by others in the trade there are no jewels that do not have *either a function of bearing or a function of protection against wear from friction*, and that it is only stones that perform these functions that are properly called "jewels" in the watch industry. C.L., Tariff Act of 1930, 46 Stat. 621, 622, 19 U.S.C. 1001, Par 367 (b), (1958)
>
> As to the Resevoil device in question, *convincing evidence indicated that the four stones of the Resevoil did not serve a mechanical function of bearing or of protection against frictional wear.* Petitioner's statement that the Resevoil watches were 21 jewel watches is therefore misleading. (emphasis supplied)

A. THE OPINION OF THE COURT IS INCONSISTENT WITH THE ORDER OF THE COMMISSION

The Complaint issued by the agency alleged: (Joint Appendix, page 2, "Paragraph Six")

> . . . . respondent represents and, has represented directly or by implication that said Tornay watches contain 21 jewels each of which *serves a mechanical purpose as a frictional bearing, that is each jewel provides a mechanical contact at a point of wear* . . . (emphasis supplied)

It is clear that the alleged misrepresentation was that Petitioner misrepresents 21 jewel watches, when they contain the four Reservoil jewels, which are not jewels because they do not serve a mechanical purpose as frictional bearings. *The issue as to the jewels before the Agency, simply stated, was whether watch jewels must serve a mechanical purpose as frictional bearings and, if so, whether the four Reservoil jewels served such purpose.*

The hearing examiner, in his initial decision, (Joint Appendix, pp. 123-138) found that the Reservoil device "*significantly increases the amount of oil to vital parts of the watch and assures longer life expectancy thereof*". (Joint Appendix, page 135-136)

Pragmatic evidence supported this finding. (Joint Appendix, pages 1107-1108).

Accordingly, the hearing examiner entered the following order with reference to the point here being made: (Joint Appendix, page 138)

> It Is Further Ordered that the allegations of the complaint that respondent falsely represented his watches to contain 21 jewels, and that his device significantly increased the amount of oil to vital parts of the watch and assured longer life expectancy thereof, be and hereby are dismissed.

The Commission affirmed the hearing examiner's finding that the Resevoil jewels significantly increase the amount of oil to the vital parts of the watch and assure longer life expectancy thereof: (Joint Appendix, page 222 H) "It is Ordered that the Complaint be dismissed insofar as those representations are involved". (Joint Appendix, page 222).

The Commission had concluded in its Opinion (Joint Appendix, page 222 G) that "As used in the watch industry and trade, a jewel must serve a mechanical function as a frictional bearing before it is entitled to be represented as a "Jewel".

Among other findings, the Commission found: (Joint Appendix page 216):

> . . . it is essential that the hole jewel be lubricated with oil . . . In the traditional 17 jewel watch, the four (train bridge) hole jewels are, in effect, open at the point where the pivot comes through . . .
> . . .

and (Joint Appendix, page 217):

> . . . Respondent's device, which has been patented by the Patent Office, consists of a small metal plate containing four stones of identical construction and material as the cap jewels found in regular 17 jewel and 21 jewel watches . . .
>
> . . . it fits exactly over the train bridge of the 17 jewel watch, (over the exposed or open hole jewels) . . . ,
>
> . . . in the same manner as the cap jewels in a regular 21 jewel watch . . .

Thus, the essence of the Commission Order and the findings and Opinion entered is that a jewel must serve a mechanical purpose as a frictional bearing by providing a mechanical contact at a point of wear.

The Court, however, upon reviewing the record, found that in 21 jewel watches sold by others in the trade "*there are no jewels that do not have either a function of bearing, or a function of protection against wear from friction.*"

This finding is inconsistent with the Order of the Federal Trade Commission from which review was here sought and, in fact, supports the Petitioner's view of the evidence in his Petition To Review—for in fact, the evidence holds and the *Commission found as did the hearing examiner initially that the four Reservoil jewels do perform the function of "protection against wear from friction".** This function is performed by significantly increasing the amount of oil at the vital parts of the watch as the Commission found Petitioner's device does.

The Supreme Court has held that a rehearing will not be granted because of an inadvertent expression in the opinion, which could have no possible influence on the reason stated which rendered it necessary to affirm the judgment. *Bradford* v. *U. S.*, 33 S. Ct., 1026, 57 L. Ed. 1630. But from the reasoning of the Court in there affirming the denial of petition for rehearing it appears logical to argue as petitioner is here, that a rehearing should be granted where the expression in the opinion of the Court appears on its face inconsistent with the reasons given for affirming the decision being reviewed.

B. CONFLICT OF ADMINISTRATIVE DETERMINATIONS

Petitioner's assignor had been granted a patent by the U. S. Patent Office for the "Reservoil" device involved in the appeal. (Joint Appendix, pages 1061-1064, 1110).

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* Since the device significantly enhances the lubrication of the bearings (vital parts) and such function is that of the lubricant in bearings.

The grant was for an improvement in the prior or traditional art of "Lubricating Jeweled Bearings of Watch Movements and Life Instrument Parts".

A reading of the claims in the patent makes it perfectly clear that the grant contemplates the use of the four Resevoil jewels in the device in conjunction with the "open or exposed hole jewels" in the train bridge of the regular 17 jewel movement. The grant, also quite obviously, is not limited to the Resevoil plate, but to the jewels assembled into the improved bearing construction which permits the added lubrication that lies at the basis of the acknowledged prior or traditional bearing art. We submit that the improved bearing for which the patent was granted is not formed until the Resevoil plate with its four jewels is affixed over the exposed hole jewels in the train bridge.

In other words, the Resevoil plate is not patented, the patent protects the inventor in his use of that plate in conjunction with the hole jewels in the train bridge of a 17 jewel movement, whereby an improved bearing is created.

Petitioner here urges that counsel did not have an opportunity to argue this point from the record to the Court, or during the limited oral argument permitted and the Court, in reaching its decision, may have overlooked the portion of the record here relied upon and, in so doing, reached a decision which conflicts with that of the U. S. Patent Office in granting the patent. Matter of Food Fair Shopping Center, Inc.; F.T.C. Docket No. 6458, (1957)."

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* *United Corp et al.* v. *F.T.C.*; 119 F 2d 473

C. NEITHER THE COURT, NOR THE COMMISSION HAS FOUND THAT THE PUBLIC IS DECEIVED

Involved in a highly technical record, all parties, and this Court, have completely overlooked the requirement of Section Five of the Federal Trade Commission Act *that the public be deceived.*

At best, the decision of the Court and that of the Commission would appear to hold that respondent's watches contain four jewels, which are not like other 21 jewel watches in the trade. But the Act requires that such finding be in the public interest.

There has been no showing in the record, and no finding by either the Commission or the Court, that the public understands "jewel" to mean something other than what Petitioner represents his watch jewels to be. *In the matter of Samuel A. Mannis*, Before the Federal Trade Commission, Docket No. 7062, Opinion of the Commission issued February 9th, 1960.

CONCLUSION

Wherefore, the premises considered, Petitioner respectfully prays that the Court order a rehearing on this Petition To Review.

Very respectfully submitted,

B. PAUL NOBLE
2140 P Street, N.W.,
Washington 7, D. C.
DUpont 7-3292
Attorney for Petitioner

Of Counsel:
NOBLE & MOYLE

CERTIFICATE UNDER RULE 26 (a)

Pursuant to Rule 26 (a) of the General Rules of the Court, I do certify that this petition for rehearing of Decision of this Court entered on the 26th day of February 1960, is presented in good faith and upon the merits suggested in the petition itself and not for purposes of delay.

/s/ B. Paul Noble
B. Paul Noble
Attorney for Petitioner

CERTIFICATE OF SERVICE

Certified that a copy of the foregoing Petition for Re-Hearing was mailed this 11th day of March 1960, postage prepaid, to Frederick H. Mayer, Esq., Federal Trade Commission, Washington, D. C., and to Alan B. Hobbes, Esq., Federal Trade Commission, Washington, D. C.

/s/ B. Paul Noble
B. Paul Noble
Attorney for Petitioner

APPENDIX F

STATUTES INVOLVED
FEDERAL TRADE COMMISSION ACT

The pertinent provisions of the Federal Trade Commission Act; 38 Stat. 717, as amended; 52 Stat. 111; 66 Stat. 632; 15 U.S.C.A. 41-58.

Sec. 5 (a) (1)
15 U.S.C.A. 45 (a) (1)

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

Sec. 5 (a) (6)
15 U.S.C.A. 45 (a) (6)

The Commission is hereby empowered and directed to prevent . . . from using any unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Sec. 5 (c)

15 U.S.C.A. 45 (c)

Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the Court of Appeals of the United States within any Circuit where the method of competition or the act or practice in question was used or where such person . . . resides or carried on business, by filing with the Court, within sixty days of service of such order, a written petition praying that the order of the Commission be set aside . . . Upon such filing of the petition, the Court shall have jurisdiction of the proceedings and of the questions determined therein concurrently

with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying or setting aside the order of the Commission, . . . the findings of the Commission as to the facts, if supported by evidence, shall be conclusive . . . The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 5 (d)
15 U.S.C.A. 45 (d)

Upon filing of the record with it, the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Sec. 5 (e)
15 U.S.C.A. 45 (e)

Such proceedings in the court of appeals shall be given precedence over other cases pending therein . . .

Sec. 9 (par. 4)
15 U.S.C.A. 49

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

APPENDIX G

STATUTES INVOLVED

ADMINISTRATIVE PROCEDURE ACT

Pertinent sections of the Administrative Procedure Act: 60 Stat. 237; 5 U.S.C.A. 1001-1011.

5 U.S.C.A. 1004 (b)

The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceedings, and the public interest permit, and (2) to the extent that the parties are unable to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

5 U.S.C.A. 1005 (a)

Any person compelled to appear in person before any agency or representative thereof, shall be accorded the right to be accompanied, represented and advised by counsel . . . Every person shall be accorded the right to appear in person or by or with counsel . . . in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment or determination of any issue, request or controversy in any proceeding (interlocutory, summary or otherwise) or in connection with any agency function . . .

5 U.S.C.A. 1006 (c)

. . . the proponent of a rule or order shall have the burden of proof . . . every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial,

or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence . . .

5 U.S.C.A. 1006 (d)

The transcript of testimony and exhibits together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title . . .

5 U.S.C.A. 1007 (a)

Initial Decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided . . . . . shall initially decide the case . . . Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency . . . such decision shall without further proceedings then become the decision of the agency. . . .

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions or . . .

5 U.S.C.A. 1009 (a)

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

5 U.S.C.A. 1009 (c)

Every agency action . . . shall be subject to judicial review. Any preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action.

APPENDIX H

STATUTES INVOLVED

PATENTABILITY, THE GRANT OF PATENTS

Patentability, The Grant of Patents, 16 Stat. 201, as amended, 29 Stat. 692; 46 Stat. 376; 53 Stat. 1212; 66 Stat. 797, 798

35 U.S.C.A.
Sec. 101

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C.A.
Sec. 103

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

COPY.

No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALLEN V. TORNEK, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 27-28) is reported at 276 F.2d 513. The findings, order and opinion of the Federal Trade Commission (J.A. 213-222H)[1] are not yet reported.

---

[1] J.A. refers to the Joint Appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. 29-30) was entered on March 23, 1960. The time for filing a petition for writ of certiorari was extended to July 29, 1960 (Pet. 32), when the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the finding of the Federal Trade Commission that the representation by the petitioner of his Tornay Watches as 21-jewel watches was false and deceptive is supported by the record.

2. Whether it was within the discretion of the Commission to allow the petitioner's competitors to file amicus briefs in the agency proceeding.

STATUTES INVOLVED

The principal statutes and rules of the Federal Trade Commission pertinent to the case are set out in Appendices F-H of the petition (pp. 41-46). Also pertinent are the provisions of Section 5(b) of the Federal Trade Commission Act, 52 Stat. 112 (1938), 15 U.S.C. 45(b) (1958) providing in relevant part:

> * * * Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. * * *.

And Section 3.11 of the Commission's Rules of Prac-

tice, 16 C.F.R. 3.11, which provides in relevant part:

> (a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the bases therefor. * * *
>
> (b) The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise shall be deemed proper.

STATEMENT

The Federal Trade Commission in its complaint (J.A. 1-6) charged the petitioner in the advertising of its watches with using unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. Among a number of other charges was the allegation that the petitioner had represented his watches as containing 21 jewels and that this was false, misleading, and deceptive since the four "jewels" added to the watch by a patented device "do not serve a mechanical purpose as frictional bearings." (J.A. 3)

The petitioner's watch consists of an ordinary 17-jewel watch movement with the patented "Reservoil" device attached. This device contains four "jewels" physically identical to those used in traditional watches. They are, however, not used in the same way. The Commission found that the jewels in traditional watches perform the function of bearing friction and reducing wear by providing a hard sub-

stance as a contact at a point of movement (J.A. 218). Petitioner's jewels also, allegedly, perform the function of bearing friction. However, they do not come into contact with any moving part of the watch. Because of the absence of physical contact, no friction is generated and thus none can be borne at the points where petitioner's jewels are located. Nevertheless, petitioner asserted that its jewels serve the function of bearing friction since a drop of oil is placed upon these jewels and the oil allegedly flows to the moving parts by capillary action.

After full hearings the hearing examiner entered an initial decision (J.A. 123-138) proposing dismissal of the complaint insofar as it charged that the petitioner falsely misrepresented his watches as containing 21 jewels. He found that the weight of the evidence did not support the contention that in the watch industry the use of the term "jewel" to describe a stone necessarily implies that it provides a contact at a point of movement.

On appeal the Commission allowed various parties to intervene in opposition to the petitioner to the extent of filing amicus briefs (J.A. 144, 146). In its findings of fact, conclusions and order (J.A. 213-222) and opinion (J.A. 222A-222H), the Commission reversed the examiner on the point here in issue, finding upon its evaluation of the evidence that in the watch industry and trade, "a jewel must serve a mechanical function as a frictional bearing before it is entitled to be represented as a 'jewel' and that the jewel-like stones in the Resevoil device do not serve such a function" (J.A. 220). The court of appeals affirmed (Pet. 27-28).

ARGUMENT

1. The petitioner's argument that there is no substantial evidence to support the Commission's finding that the term "jewel", as used in the watch industry and trade, implies contact at a point of movement is based primarily on the fact that the Commission overruled its examiner on this point. The petitioner concedes that there was evidence to support the Commission's position (Pet. 18), but alleges that the Commission failed to give adequate weight to the examiner's opinion. In fact, the Commission gave careful consideration to the finding of the examiner on this point (J.A. 222C), but, after carefully considering and weighing the conflicting evidence, found that the weight of the evidence supported the adoption of a narrow definition for the term "jewel"; one not consistent with the petitioner's advertised claims. In reaching its independent judgment as to the evidence, the Commission was fulfilling its statutory function as a fact-finding agency. The Commission is obliged to consider the findings and conclusions of its examiner, as it did here, but, contrary to the petitioner's claim, it is not precluded from rejecting the examiner's findings unless they were clearly erroneous. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358.

Nor is there anything inconsistent between the Commission's finding with regard to the meaning of the word "jewel", as related to the advertising of

watches, and the patent issued for the Resevoil device. The issuance of the patent indicates that the petitioner's device is useful and novel; it does not purport to be a license to advertise watches containing the device in any particular manner. *Cf. Decker* v. *Federal Trade Commission*, 176 F.2d 461 (C.A.D.C.), certiorari denied, 338 U.S. 878.[2]

2. The petitioner's contention that the Commission's action was a violation of due process because the Commission permitted various applications to intervene as *amicus* while the appeal from the hearing examiner's initial decision was pending before it is without merit. The pertinent provisions of Section 3.11 of the Commission's Rules of Practice (p. 3, *supra*) specifically empower the Commission to permit any person, partnership or corporation to intervene "to such extent and upon such terms, as are provided by law or as otherwise shall be deemed proper." Nothing therein or in Section 5(b) of the Act precludes the Commission from granting an application to intervene after the hearing examiner has rendered his initial decision where the Commission in its discretion believes it will be aided thereby.

---

[2] The petitioner's contention that the language of the court's opinion is inconsistent with the findings of the Commission (Pet. 21-25), presents no issue warranting further review. A petition for rehearing calling attention to the alleged inconsistency was denied by the court of appeals. It is thus entirely clear that the court was aware of the exact issue before it, and that its choice of language in affirming the Commission, regardless of its technical accuracy, could not be grounds for reversal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 282

ALLEN V. TORNEK, An Individual Trading As ALLEN TORNEK COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING

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v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING

The Petitioner, Allen V. Tornek, by and through counsel, respectfully petitions the Court for rehearing of order denying petition for a writ of certiorari entered on the 10th day of October 1960, and as reasons therefor submits the following:

OTHER SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER ALTHOUGH NOT PREVIOUSLY PRESENTED

The following reasons previously overlooked or not clearly stated in the first Petition, as to why writ should be granted in this matter are set out below:

The Opinion and Final Decree of the Court of Appeals reflects erroneous statement of fact crucial to

legal application both in the instant case and broadly as Stare Decisis.

The first Petition filed in this matter attempted to set out the fact that the Court of Appeals decision was hinged on a mistake of fact. On reflection, counsel for petitioner now earnestly urges that this crucial point did not appear clearly and did not recite proper case authority so as to give this Court a coherent picture of the issues involved.

As previously pointed out, the Court of Appeals stated in its Per Curiam opinion, referring to 21 jewel watches in the trade that "*there are no jewels that do not have either a function of bearing, or a function of protection against wear from friction*".

This statement of the facts by the Court of Appeals in its Opinion is *consistent with the evidence as urged by petitioner here*, and with the findings and conclusions entered by the hearing examiner below; *but it is inconsistent with the findings and conclusions entered by the Commission*, which reversed the hearing examiner, who had found that petitioner's jewels served the function of protecting against wear from friction.

That is, it has consistently been the position of the petitioner that since the hearing examiner and the Commission both found that petitioner's special jewels increase the longevity of moving parts of the watch, then, these jewels are performing "*a function of protection against wear from friction*", even though not serving "*a function of bearing*". The erroneous statement of fact appearing in the Opinion of the Court of Appeals throws the legal principles into a state of chaos. For, if the Court of Appeals means what it says

in the Opinion, then it cannot affirm the order of the Federal Trade Commission, as even the Commission has conceded that longevity of parts is extended by petitioner's resevoil device. If the Court of Appeals does not mean what it says in the opinion, then the whole watch industry will suffer under the misapprehension that a device that prolongs longevity against wear may be called a jewel, even though not serving a function as a bearing, for this is the statement of the Court of Appeals.

This Court has faced the dilemma of conflicting opinions before, and the Court's attention is most respectfully drawn to the following cases: *CIR* v. *Church's Estate*, 335 U.S. 632; *Helvering* v. *Hallock*, 309 U.S. 106; *Helvering* v. *St. Louis Transit Company*, 296 U.S. 39.

While these cases involved interpretation of the Internal Revenue Code, the principle is the same as that in the instant case. Two controlling authorities cannot stand antipodal without the creation of chaos and confusion. It is most respectfully submitted that the decision of the Court of Appeals will in its present state create confusion because of facts previously stated.

It is well established that a decision based on a judicially noticeable error is not to be followed as Stare Decisis. *Moore* v. *U.S.*, 157 F. 2d 760 (1946). Yet, unless this Court acts to clarify either an injustice, or a mistake of fact, such a decision will in fact be controlling for an undeterminable period, and will undoubtedly create the same type of confusion as was manifested in those cases already cited.

CONCLUSION

The definition of a watch jewel given by the Court of Appeals in its opinion, consistent with petitioner's arguments throughout these hearings, is a misstatement of fact if it purports to adopt findings and conclusions of the Federal Trade Commission, which rejected this definition in reversing its duly designated hearing examiner.

That definition will make enforcement of the cease and desist, at best, difficult and will serve to confuse the watch industry generally since it provides a definition which that industry has never been willing to accept.

WHEREFORE, the premises considered, in light of the substantial grounds here presented but, although available to petitioner, not previously presented, petitioner prays that this Petition For Rehearing be granted.

CERTIFICATE OF FILING IN GOOD FAITH

I, B. Paul Noble, being counsel for Petitioner, Allen V. Tornek, certify that this petition for rehearing is filed in good faith and not for purposes of delay, and that the Petition is based upon substantial grounds available to the petitioner although not previously presented as prescribed in Rule 58 (2) of the Revised Rules of the Supreme Court of the United States.

Very respectfully submitted,

B. PAUL NOBLE

CERTIFICATE OF SERVICE

Certified that a copy of the foregoing PETITION FOR REHEARING was mailed this 3rd day of November, 1960, postage prepaid to Frederick H. Mayer, Esq., Federal Trade Commission, Washington, D. C., Alan B. Hobbes, Esq., Federal Trade Commission, Washington, D. C., Office of the Solicitor General, Justice Department, Washington, D. C.

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